NO. 79884-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE NINTH CIRCUIT COURT OF APPEALS

IN

J & J CELCOM, *et al.*, Appellants

v.

AT&T WIRELESS SERVICES, INC., *et al.*, Appellees

APPELLANTS' RESPONSE TO APPELLEES' MOTION TO STRIKE PARTS OF BRIEF

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A. INTRODUCTION

The Ninth Circuit has sent this case to this Court in order to determine what the relevant law of Washington is. It did not send the case for this Court to determine the winner or loser of a summary judgment hearing held in the Federal District Court. No summary judgment hearing was held in a Washington state court.

In order to make a definitive statement what the law of Washington is, it is obvious that the best sources may not be limited to the record of a particular summary judgment hearing. This is so especially since the argument raised by the Appellant AT&T Wireless Services ("AWS") at summary judgment did not include the argument it is making to this Court.

B. CONSTITUTIONAL ISSUE

AWS in its "Motion by AT&T Wireless Services, Inc. to Strike New Evidence and Argument from Reply Brief of Appellants" really wants to deprive the Appellants (the "Minority Partners") of the value of their property in the

partnerships. Accordingly, AWS equates the United States Constitution with "gamesmanship." Citing to the U.S. Constitution is not gamesmanship.

First, AWS says nothing whatsoever about RAP 2.5 (a). Of course, under this rule, the minority partners may raise constitutional issues.

Next, the Ninth Circuit has not asked this Court to rule on who won and who lost the summary judgment in the Federal District Court. It asked for an interpretation of Washington law. This Court can and should, in every case interpreting Washington law, look at the interplay of the state and federal constitutions with our state's legislation. If the statute is infirm, then this Court has a duty to say so. It doesn't matter whether the issue was pleaded by anyone at any time before the case was certified by the Ninth Circuit.

Finally, the constitutional issue is being raised in rebuttal. It is only "new argument" as alleged by AWS because AWS did not raise its current argument in the Federal District Court summary judgment proceeding.

In the summary judgment proceeding, AWS did not mention *Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950), or *Bassan v. Investment Exchange Corp.*, 83 Wn.2d 922, 524 P.2d 233 (1974). AWS did not mention RCW 25.05.165(1), (2), or (5), nor did it mention RCW 25.05.015(2)(c)(ii), or former RCW 25.04.210, all of which are included in AWS' Answering Brief to this Court. In its reply brief on summary judgment, it mentioned RCW 25.05.165(6) for the first time.

AWS on summary judgment relied on the case of *Holman v. Coie*, 11 Wn.App. 195, 522 P.2d 515 (1974) to attack the Minority Partners' claim of breach of fiduciary duty. *Holman* involved a law partnership with a partnership agreement that stated "any member may be expelled from the Firm by a majority vote of the Executive Committee." *Id.* at 202. More importantly, *Holman* was a breach of contract case, not a case brought for the breach of the duty of loyalty. Partnership fiduciary duties were discussed in passing, but the duty of loyalty was not.

In the Answering Brief to this Court, AWS seems to be saying that, under *Bassan*, only if AWS knew at the time of the squeeze-outs that it would be selling itself to Cingular for a certain sum, would it have owed any fiduciary duty to the Minority Partners. (Of course by selling the assets of the Partnerships to other entities exclusively owned by AWS, AWS was banking those assets to sell at a future date). This was not argued at summary judgment. Again, AWS argues that RCW 25.05.165(6) effectively trumps Bassan and the highly protective common-law sphere of the duty of loyalty as described in that case. If the new argument made by AWS to this Court were followed by this Court then there would be, at the minimum, an "as applied" issue of impairment of contractual obligation, as indicated in Minority Partners' Reply Brief.

AWS has also done a complete about-face even from the argument it presented the 9th Circuit. There, AWS argued that *Karle* was the controlling law. 2005 WL 4662905 *38-39. Now, AWS has taken the opposite tack:

> While the duties articulated in *Karle* are consistent with the later-adopted provisions of the RUPA, the holding does not assist the Court in answering the certified question because the facts there were obviously much different from the situation here. . . . There is nothing about the present case that remotely resembles [*Karle's*] facts.

Answering Brief at 14-15.

Since AWS's summary judgment was not based on the argument it now features, the Minority Partners should not be barred from responding to the argument AWS now raises.

C. DEFINITIVE PROXY STATEMENT

AWS constantly harps that there was no evidence the sale to Cingular was contemplated when the squeeze-out sales were made in 2002. (*See e.g.* Answering Brief at 15 ["There is no evidence that a higher purchase offer was in hand..."]). But AWS says:

> AWS cannot be faulted for having not disclosed hypothetical profits on a hypothetical future merger that was not anticipated when the subject transactions occurred.

Answering Brief at 16-17.

AWS is clearly attempting to create the impression that it had no intent to sell the company or position the company for sale at the time of the squeeze-out sales. That is not true, as demonstrated in the Definitive Proxy Statement.[1] It never argued at summary judgment or anywhere else that it wasn't attempting to sell the company during the time of the squeeze-outs.[2]

In deciding a motion to dismiss, a court may take judicial notice of the contents of relevant SEC filings, including Definitive Proxy Statements. *See, e.g., Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.1991). The use of those documents may be limited to determining what was said in the documents (as opposed to the truth of the documents) (*id.)* but that is enough to show that AWS at least *said* to the SEC and to investors that it had courted suitors, including SBC and BellSouth, during the time leading up to and during

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1 http://www.sec.gov/Archives/edgar/data/1138234/000095012304003552/v96651dmdefm14a.htm#106 (last visited 8 June 2007).

2 There may have been no firm offer "in hand" but there were negotiations afoot.

the time of the squeeze out sales. Judicial notice may be taken at any time in the proceeding. ER 201 (f). It may be taken *sua sponte* by the Court. ER 201 (c). It should be taken here.

D. APPENDIX

The material in the Appendix was submitted for the convenience of the Court in order not to have to navigate to a webpage with a long address. The Court can surely decide whether it wishes to keep it in an appendix or not.

DATED this 8th day of June, 2007.

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